SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1974

NO. 74-467

BUILDING OWNERS & MANAGERS ASSOCIATION OF METROPOLITAN DETROIT, BOOK BUILDING CO., COMFORD INVESTMENT CO., FISCHER NEW-CENTER CO., FORT STREET REALTY CO., GUARDIAN BUILDING CORPORATION, WASHINGTON BOULEVARD BUILDINGS, INC., WILLEMAN INVESTMENT CO.,

On behalf of themselves and all other users of Detroit Edison Company steam heat in the metropolitan Detroit area
CITY OF DETROIT, COUNTY OF WAYNE, ATTORNEY GENERAL OF THE STATE OF MICHIGAN
Petitioners,

vs.

THE DETROIT EDISON COMPANY
and
MICHIGAN PUBLIC SERVICE COMMISSION
Respondents.

REPLY OF RESPONDENT MICHIGAN PUBLIC SERVICE COMMISSION TO PETITION FOR WRIT OF CERTIORARI

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Respondent Michigan Public Service Commission herewith replies in opposition to the Petition for Writ of Certiorari to review the Order of the Supreme Court of the State of Michigan entered on July 24, 1974.

JURISDICTION

Petitioners seek to invoke the jurisdiction of this Court pursuant to 28 USC §1257(3). Respondent Michigan Public Service Commission denies that the petition states any grounds upon which such jurisdiction may be invoked.

QUESTION PRESENTED

The Michigan Public Service Commission (Commission) conducted a hearing on a rate application by The Detroit Edison Company (Edison) and subsequently entered an order authorizing Edison to increase its rates which had been in effect for 8 years for steam service which it provides in the Detroit area. Prior to the hearing, notice thereof was given to Edison and to the City of Detroit.

On an appeal from the rate order, the Circuit Court of Ingham County determined that the failure to provide notice to the individual steam users constituted a violation of procedural due process. The Circuit Court ordered Edison to post a bond for $10,000,000 to insure the refund of any execessive steam rates, and it remanded the matter back to the Commission with instructions to reopen the proceedings, give adequate notice thereof to its steam users, take further evidence which might be submitted by the steam users, and to redetermine the steam rates if deemed appropriate.

The Circuit Court expressly retained jurisdiction to review the reasonableness of the steam rates upon conclusion of the remanded proceedings before the Commission and to determine the manner of refunding excessive rates collected by Edison, if any such refund should ultimately be deemed necessary.

The Petitioners appealed a portion of the order of the Circuit Court which denied their motion for immediate refund of the rates collected by Edison under the Commission order.

The question presented is whether there was abuse of discretion by the Supreme Court of the State of Michigan in not granting leave to appeal from a portion of the interlocutory order of the Circuit Court, where that order contained no finding on the ultimate substantive issue of the reasonableness of the steam rates and it remanded the matter back to the Commission to give adequate notice and conduct further proceedings, while providing, during the interim, that Edison post a bond sufficient to assure refund of any excessive steam rates which might be collected by it during the pendency of the new determination by the Commission.

COUNTER STATEMENT OF THE CASE OF RESPONDENT MICHIGAN PUBLIC SERVICE COMMISSION

The respondent Commission is an agency of the State of Michigan which has been delegated with the responsibility of determining and authorizing fair and reasonable rates for services offered by the public utilities in the State of Michigan.

On May 7, 1970, Edison filed an application with the Commission seeking to increase rates covering the supply of steam to approximately 1,200 steam customers in the downtown and midtown Detroit area (Commission Case No. U-3678). Hearings on the application were held before the Commission on September 1, 3 and 11, 1970. Written notice

of the hearing was sent to the City of Detroit by the Commission pursuant to MCLA §460.6A.

On September 21, 1970, Building Owners & Managers Association of Metropolitan Detroit (BOMA), one of the petitioners herein, filed its delayed petition to intervention and rehearing and its petition was denied by the Commission that day. Also, on September 21, 1970, the Commission issued its order authorizing Edison to increase its steam rates effective on and after September 21, 1970.

On October 19, 1970, petitioner, Building Owners & Managers Association of Metropolitan Detroit (BOMA), along with six private corporations or partnerships that owned or operated buildings that received steam service from Edison, commenced this action in the Circuit Court for Ingham County alleging that the September 21, 1970 Commission order was unlawful and unreasonable because the Commission had failed to provide actual notice to the steam power users, the rate increase was not calculated on a proper rate base, and that the Commission had disregarded the provision of the contracts between Edison and various users of steam power which required a six-month notice of change of rates. On November 13, 1970, Edison was ordered to be added as a party defendant to the proceedings.

On February 2, 1971, petitioners filed a Motion for Declaration of Class Action. The Motion was granted by the Court on June 4, 1971. Later, other petitioners were permitted to intervene.

On February 4, 1972, petitioners filed a motion seeking a summary judgment declaring the September 21, 1970 order of the Commission null and void and ordering a full refund and repayment of the steam rate increase collected thereunder.

On April 11, 1973, the Court granted petitioners' motion in part, finding that the Commission had failed to provide certain petitioners with adequate notice of the application and hearing. The Court then remanded the matter to the Commission for the purpose of giving adequate notice to individual users of steam heat and for the taking of evidence from the parties and possible redetermination of the rates established by the Commission in its September 21, 1970 order.

On April 26, 1973, petitioners filed a motion for rehearing entitled "Motion for Supplemental Order" requesting that the Court (a) prohibit the collection of any further steam rate increases provided for in the Commission's order of September 21, 1970, and (b) order Edison to refund all sums collected pursuant to the Commission order.

On July 19, 1973, the Court heard arguments of the parties and subsequently received extensive briefs, including a reply brief and a supplemental brief, from the parties.

On October 23, 1973, petitioners filed a Motion for Prompt Decision on their pending Motion for Supplemental Order which was noticed for hearing by petitioners on January 11, 1974. On January 11, 1974, the Court issued its Order Denying Petitioner's Motion for Supplemental Order but the Court did order respondent Edison to post a $10,000,000 bond in order to insure a refund to petitioners if, on hearing before the Commission regarding the substantive reasonableness of the rates, such refund was found to be proper. On January 28, 1974, respondent Edison filed said bond.

On January 30, 1974, petitioners filed a Claim of Appeal to the Court of Appeals of the State of Michigan. On May 9, 1974, the Court of Appeals dismissed petitioner's Claim of Appeal.

On May 10, 1974 petitioners filed an Application for Leave to Appeal in the Supreme Court of the State of Michigan. On July 24, 1974 the application for leave to appeal was denied.

ARGUMENT

I.

THE MICHIGAN SUPREME COURT PROPERLY DENIED LEAVE TO APPEAL SINCE THE ORDER OF THE LOWER COURT SPECIFICALLY WITHHELD DISPOSAL OF THE SUBSTANTIVE ISSUE BETWEEN THE PARTIES.

The Circuit Court in its order of remand specifically indicated that it took no position and would conduct no inquiry into the reasonableness of the steam rates authorized by the Commission until after the proceedings on remand had been concluded and the Commission had exercised the opportunity to determine whether the rates should be altered.

Further, consistent with this ruling the Circuit Court utilized a procedure commonly used by a number of regulatory agencies and ordered that Edison post a bond, sufficient in the eyes of the Court, to assure a refund of any rates ultimately deemed excessive. This action by the Court had the dual effect of retaining the status quo of the matter and of guaranteeing the rights of Edison's steam customers.

The action of the Circuit Court is a classical example of an interlocutory decision, being dispositive of none of the substantive issues in the case. The Michigan Supreme

Court in the absence of any statutory provisions has repeatedly frowned on granting appeals on orders of this nature.

In *Garbino* v *Lee C. Miller,* 48 NW 2d 217, 330 Mich 688 (1951), the Michigan Supreme Court, on the basis of prematurity, denied an appeal from an order of reference by a lower court to a circuit court commissioner, stating, at pages 219 & 220, in part as follows:

> "It does not appear in the record on this appeal that the trial judge passed upon any of the controverted issues . . .
>
> "But under the record it was within the discretion of the circuit judge to order reference to the circuit court commissioner 'for an accounting' as to any claim proven by plaintiff. The circuit judge had not finished the hearing of the instant case or rendered a final decision therein before making the order of reference to the circuit court commissioner from which defendants took this appeal. 'Unless otherwise provided by statute, a judgment, decree or order, in order to be appealable as of right, must be a final one.' 7 Callaghan's Michigan Pleading and Practice, § 53.12. In the instant case the order of reference was not a final order.
>
> "Defendants' appeal taken as a matter of right was premature and improperly taken. . . . The relief sought by appellants on this appeal is denied, and the cause remanded for further proceedings therein. . . ."

See also *Wurzer* v *Geraldine,* 256 NW 439, 268 Mich 286 (1934); *Airport Recreation Club* v *Morris,* 286 NW 131,

288 Mich 694 (1939); *Ashford* v *Unemp Comp Comm*, 43 NW 2d 918, 328 Mich 428 (1950).

There is no question that petitioners have no statutory right of appeal of the order of the Circuit Court. There is no question that the Circuit Court recognizes its responsibility to review the ultimate determination of the Commission and that it has explicitly taken steps to preserve the status quo until such time as that review has been concluded. Under the circumstances, denial by the Michigan Supreme Court of leave to appeal was not only consistent with its practice but also consistent with proper procedures for judicial administration.

II.

THE PETITIONERS' PREMATURE APPEAL FAILS TO PRESENT A CAUSE OF ACTION UPON WHICH THIS COURT SHOULD EXERCISE ITS JURISDICTION.

As has been repeatedly espoused by this Court, the polestar of federal review has always been "finality", i.e., review of interlocutory actions must await final determination of the cause at the trial level.

> "Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all." Cobbledick v United States, 309 US 323, 324, 325 (1939).

See Also: *Market Street R Co* v *Railroad Com*, 324 US 548 (1944); *Republic Natural Gas Co* v *Oklahoma*, 334 US 62 (1947); *Cohen* v *Beneficial Industrial Loan Corp*, 337

US 541 (1948); *Di Bella v United States*, 369 US 121 (1961); *cf. Federal Trade Com* v *Minneapolis-Honeywell Regulator Co*, 344 US 206 (1952); *United States* v *F. M. Schaefer Brewing Co*, 356 US 227 (1957).

There is no question here that the order of the Circuit Court is interlocutory in nature and that upon completion of the remand the Circuit Court intends to exercise its jurisdiction of review of the procedures and conclusions of the Commission in regard to its consideration and redetermination of Edison's steam rates. Under the circumstances, it cannot be argued, nor do the Petitioners attempt to do so, that failure of this Court to exercise its jurisdiction, at this stage of the rate proceedings, will deny petitioners their right of review.

Further, there is the prospect that upon completion of the remanded proceeding before the Commission the need for judicial assistance beyond the Circuit Court level may become unnecessary for petitioners. If the Commission should determine that a lower level of rates, or, for that matter, that the previous schedule of rates should be authorized, then the Circuit Court is prepared to oversee the refunding of the excessive amounts collected by Edison pursuant to the present rate order.

Were this Court to grant the petition it would only further delay the completion of proceedings which have been pending for more than four years in the judicial tribunals and further hinder the ultimate ends of justice without having provided for any meaningful relief on the ultimate substantive issue which as yet remains undecided in this matter, i.e., the reasonableness of Edison's rates for its steam service.

III.

THE DETERMINATION OF THE CIRCUIT COURT THAT THE RATE ORDER OF THE COMMISSION HAD BEEN ENTERED WITHOUT ADEQUATE NOTICE TO ALL OF THE STEAM USERS WAS NOT SUFFICIENT TO MAKE THAT ORDER IMMEDIATELY VOID AS A DENIAL OF FUNDAMENTAL DUE PROCESS UNDER THE CONSTITUTION OF THE UNITED STATES.

The Circuit Court remanded the rate proceedings back to the Commission based upon the determination that adequate notice had not been given to Edison's steam users prior to conducting the hearing on the steam rates. In doing so, he characterized his finding of denial of procedural due process as a denial of fundamental due process. It should be pointed out, however, that the Circuit Court looked askance at any utility rate order being issued without full provisions for notice and hearing, even that of a municipally owned and operated utility. In that conclusion the court was wrong.

As has been pointed out by this Court, where a legislative function which requires no notice or hearing is delegated to an administrative agency, failure of that agency to provide notice does not constitute denial of fundamental due process under the Fourteenth Amendment of the Constitution of the United States. In *Bowles B. Willingham,* 321 US 503 (1943) the Court discussed the Fifth and Fourteenth Amendments in connection with certain rent orders issued by the Administrator of the Office of Price Administration without prior notice or hearing to landlords. It concluded that due process had been afforded to the landlords through provision by Congress for judicial review after the orders had been made effective.

In respect to utility rate matters, in *California Pub Utilities Comm* v *United States*, 356 F 2d 236 (1966) cert den 385 US 816 (1966), in a matter involving the Federal Communications Commission, it was pointed out by the United States Court of Appeals, Ninth Circuit at page 241 as follows:

> "Even if they had merit, petitioner's allegations of lack of notice and opportunity to be heard could not raise constitutional questions unless proceeding from a deprivation of property claim. Public utility regulation, historically, has been a function of the legislature; and the prescription of public utility rates by a regulatory commission, as the authorized representative of the legislature, is recognized to be essentially a legislative act. Colorado Interstate Gas Co v. Federal Power Commission, 324 U.S. 581, 589, 65 S. Ct. 829, 89 L. Ed. 1206 (1945). As a ratepayer would have no constitutional right to participate in a legislative procedure setting rates, this right to be heard in a commission proceeding exists at all only as a statutory and not a constitutional right."

The statutory rights of the petitioners have been fully recognized and protected by the action of the Circuit Court and pursuant to its order of remand petitioners will be afforded a full opportunity to be heard in the rate proceedings.

IV.

THE ORDER OF REMAND DOES NOT IMPOSE ANY GREATER BURDEN UPON THE PETITIONERS THAN THAT WHICH WOULD HAVE BEEN IMPOSED UPON THEM IN THE ORIGINAL HEARING.

As pointed out previously, utility rate making is a legislative function. It is a determination by the Commission of the fair and reasonable rates that should be charged based upon the evidence. If the petitioners and other steam users of Edison had appeared and participated in the original hearing, they would have had opportunity to examine the witnesses and evidence submitted therein and to present whatever additional or counter proofs they deemed essential to the decision-making process. The order of remand of the Circuit Court provides exactly the same opportunities. The Commission interprets the order of remand to require the Commission to grant the petitioners and other steam users every opportunity available in the original rate hearing.

Pragmatically, the Commission considers this to be, in effect, a new hearing on the issue of reasonable steam rates to be authorized to Edison, irrespective of how it is characterized. The determination and authorization of utility rates is an ongoing function of the Commission and the procedure for accomplishing this function will be followed on the remand just as it was in the original proceeding.

Therefore, there is no shifting in the burden of proof that will result from the order of remand of the Circuit Court.

CONCLUSION

The Petition for Writ of Certiorari has failed to state any grounds upon which the Court may exercise its jurisdiction and therefore the Respondent Michigan Public Service Commission prays that it be denied.

Respectfully submitted,
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